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No. 85-1373

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

MASSMAN CONSTRUCTION CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the amount of an equitable adjustment made in a construction contract with the United States.

1. In March 1983, petitioner was awarded a fixed-price contract by the Army Corps of Engineers for the construction of a dam and related structures in Missouri. The contract included a requirement that petitioner furnish cement for certain concrete construction. After the contract was awarded, the parties agreed[1] to change the type of cement from "Option 3" to "Option 2," the latter being the preferred cement for the type of mass structures covered by the contract. See Pet. App. A15, A23, A25.

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[1]This change was at petitioner's suggestion (see Pet. App. A15, A25, A42-A44).

In making an equitable adjustment under the "changes" clause of the contract to account for the change in cement, the Corps' contracting officer took into account the fact that, had petitioner actually been obliged to supply at the bid price the type of cement required initially by the contract, petitioner would have incurred a loss. Petitioner objected to this procedure, insisting that it was due the actual cost for the Option 2 cement supplied plus profit, without adjustment for what the cost would have actually been to supply the Option 3 cement. Accordingly, petitioner appealed the contracting officer's decision to the Corps' Board of Contract Appeals. Pet. 5; Pet. App. A15, A17, A26.

The Board (Pet. App. A23-A39) awarded petitioner the actual cost of Option 2 cement, plus 8.7% for overhead and labor (the same markup that petitioner had added to its original bid) (*id.* at A36-A37). The Board then reduced the reimbursement by the loss petitioner would have suffered if it had completed the project with Option 3 cement (*ibid.*). In the Board's view, petitioner's original bid was "improvident" and "based upon a [price] gamble which did not pay off" — since, rather than decline as petitioner had thought, the price of Option 3 cement actually escalated from the time of the bid to the time the contract was to be performed (*id.* at A24, A33). The Board's adjustment was made in order to "transfer the parties' respective profit/loss positions from the original contract to the contract as changed by the substitution of Option 2 cement for Option 3" (*id.* at A38) (citing *KECO Industries, Inc.* v. *United States*, 364 F.2d 838 (Ct. Cl. 1966), cert. denied, 386 U.S. 958 (1967)). In computing the loss, the Board took into account the rise in the cost of cement and freight transportation, the amount of cement actually used on the project, and a cash discount for prompt payment (Pet. App. A34).

Petitioner next sought review in the Claims Court of the Board decision, invoking the Wunderlich Act, 41 U.S.C. 321 (Pet. App. A3). The Claims Court, in an unpublished, oral opinion (*ibid.*; *id.* at A14) affirmed in relevant part[2] the Board's decision, holding that it was supported by substantial evidence and correct as a matter of law (*id.* at A14-A22). Like the Board, it relied on the established case law of the Court of Claims, especially *KECO Industries, Inc.* v. *United States, supra*, and *Nager Electric Co.* v. *United States*, 442 F.2d 936 (Ct. Cl. 1971).

The Court of Appeals for the Federal Circuit affirmed (Pet. App. A3-A4), holding that the Board's decision was supported by substantial evidence and that "[t]he formula that the Board applied in calculating the equitable adjustment, and which the Claims Court sustained, is the proper measure for an equitable adjustment in those instances in which the Government orders a substitution of materials" (*ibid.*) (citations omitted).

2. The unpublished, non-precedential (see Pet. App. A2) decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals,[3] and presents no important issue for this Court's consideration. Review by this Court — the fifth authority to which petitioner has gone — is unwarranted.

a. Petitioner first contends (Pet. 7-14) that it is entitled to a higher award than it received for its overhead, bond premium, and profit in connection with furnishing Option 2

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[2]The Claims Court also granted judgment for the government on its counterclaim, which sought recovery of interest paid on the equitable adjustment (Pet. App. A19-A21). The Federal Circuit subsequently reversed on this issue, and ordered the counterclaim dismissed (*id.* at A4-A8). The recoupment issue has not been raised by the government, and therefore is not before this Court for review. See Pet. 6 n.2.

[3]Indeed, the petition cites no decision of this Court or any other court of appeals.

cement, on the grounds the actual costs of these items had already been stipulated by the parties. Petitioner, however, misstates the nature of the stipulation, which the Board found to have been "used for other contract modifications" and to have been "inappropriate for this computation" (Pet. App. A37; see also Appellee Br. 37-38). Accordingly, the Board was correct in recalculating the Option 2 overhead, bond premium, and profit (see Pet. App. A36-A37). This recalculation, and the factbound decision to make it, were affirmed by two lower courts and do not merit further review. *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

b. Petitioner's other contention (Pet. 15-25) is that as a matter of law the Board erred when it took into account the fact that, had petitioner actually been obliged to supply the Option 3 cement required initially by the contract, petitioner would have incurred a loss. Petitioner argues that, instead, the Board should have simply allowed payment of petitioner's actual costs (plus, of course, a profit markup). While there is perhaps a presumption that the actual costs incurred will be awarded, it is well established that the presumption can be overcome, as it was here, by a showing that the claimant would have lost money had there not been a substitution. See *KECO Industries, Inc.* v. *United States*, 364 F.2d 838, 848-850 (Ct. Cl. 1966), cert. denied, 386 U.S. 958 (1967); see also *Pacific Architects & Engineers, Inc.* v. *United States*, 491 F.2d 734, 739 (Ct. Cl. 1974); *Nager Electric Co.* v. *United States*, 442 F.2d 936, 946 (Ct. Cl. 1971) ("The equitable adjustment, in other words, should not increase the plaintiffs' loss nor decrease it at the expense of the Government") (citations omitted); *S.N. Nielsen Co.* v. *United States*, 141 Ct. Cl. 793, 796-797 (1958). The tribunals below properly followed *KECO* and did not allow petitioner to benefit, at the expense of the government,

from the agreed contract substitution. Further review is not warranted.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[4]Petitioner's extended discussion of the deleted severable bid item rule is beside the point because this case involves a *change* in a bid item, not a deletion (Pet. App. A17, A26).